

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES E. LEACH,

Defendant-Appellant.

UNPUBLISHED
September 30, 2003

No. 240388
Oakland Circuit Court
LC No. 00-175984FH

Before: Donofrio, P.J. and Fort Hood and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of resisting and obstructing a public officer servicing process or executing order pursuant to MCL 750.479(1)(A). He was sentenced to one year of probation plus costs. Defendant appeals as of right. We affirm.

I. FACTS

In this criminal case, defendant James E. Leach appeals his jury trial conviction for the offense of resisting and obstructing a housing inspector when the inspector attempted to serve an administrative warrant. Daniel Doty is a housing inspector for the City of Pontiac whose duties include the inspection of rental property. Doty testified that in February 1999, he went to 284 Caesar Chavez in Pontiac, Michigan after he received complaints from a tenant concerning a leaky roof and electrical problems. Defendant met Doty at the door. Doty informed defendant of his position as a housing inspector. Defendant refused to let Doty enter the home, stating that defendant had a land patent, which exempted him from housing codes. Doty did not find a proper land patent for defendant's property. Doty found that defendant did not have the certificate of occupancy necessary for rental property.

On March 9, 1999, Doty obtained a search warrant and returned to defendant's property with other inspectors, zoning inspectors and Pontiac police officers. Doty read the warrant to defendant and told him that the warrant was issued because of unregistered rental property and safety concerns. Doty also told defendant the purpose of the visit was to inspect the property. Defendant refused to allow Doty to enter three times. Detective Hargott warned defendant that if he continued to refuse entry, he would be arrested. The facts are disputed as to how much time elapsed before defendant was arrested. Defendant attempted to call his attorney and requested to speak with his father before he was arrested. Defendant did not physically harm the officers; however, he ignored the officers requests to get into the police car.

Once inside the home Doty noticed someone videotaping. At trial, Cheryl Poleshuk testified that she was inside of the residence when Doty came to serve the warrant. She testified that defendant woke her up and she began taping the incident. Poleshuk testified that she lived in the three-unit house that was occasionally occupied by other people.

Poleshuk also testified that she is the mother of defendant's child, and that she lived with defendant for 14 years; however, the two are not legally married. During the voir dire session, defense counsel introduced Poleshuk as defendant's wife, Mrs. Leach, but at trial, Poleshuk told the prosecutor that she was not married to defendant. Defense counsel said that defendant's family advised him that Poleshuk's last name was Leach. Trial was the first time defense counsel learned that Poleshuk was not defendant's wife.

In his closing arguments, the prosecutor spoke about Poleshuk's relationship with defendant. He also urged the jury to uphold the laws that protect the people and keep society civilized. On December 18, 2001, the jury found defendant guilty and, subsequently, defendant was sentenced to one year of probation, plus costs and supervision fees. Defendant appeals the conviction on grounds that the prosecutor made improper remarks in his closing arguments and at trial when he improperly cross-examined Poleshuk, and made references to facts not in evidence concerning unregistered and unsafe rental property.

II. STANDARD OF REVIEW

This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error. *People v Carines*, 460 Mich 750, 752-753, 764, 597 NW2d 130 (1999). Defendant must demonstrate plain error that affected his substantial rights, or the outcome of the proceedings. *Carines, supra* at 763-764, 597 NW2d 130. No error requiring reversal will be found unless the prejudicial effect of the improper remarks could not have been cured by an appropriate instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

III. ANALYSIS

A. Prosecutorial Misconduct

Defendant first argues that the prosecutor made improper remarks during the trial that deprived defendant of his due process rights, requiring reversal. We disagree.

First, defendant relies on *People v Biondo*, 76 Mich App 155; 256 NW2d 60 (1977), to support his contention that the prosecutor improperly used a "civic duty" argument in his closing. The *Biondo* court stated:

The 'civic duty' tactic of jury argument has been repeatedly condemned by this court as prejudicial since it injects into a trial issues unrelated to the particular defendant's case. In *People v Farrar*, 36 Mich App 294, 298-299; 193 NW2d 363 (1971), the court [stated] . . . 'The prosecutor may not subtly convert the

presumption of innocence into a presumption of guilty by appealing to the jurors to perform a civic duty to support the police[.] *Id.* at 158-159.

In *Biondo*, the prosecutor asked the jury to help make Detroit a great city again and to keep the crime rates lower by convicting the defendant. The defense counsel objected to those statements.

In the case at bar, the prosecutor stated:

Now this country was founded on a system of laws that was created and enacted by the representatives of the people. As citizens, we are bound by these laws, all of us. These laws serve to protect us, protect us from other people, to protect us from other nations, to protect us from tyranny and anarchy, and these laws are something that we must uphold, these laws are something that makes our society civilized. Without laws, our country is nothing but a group of individuals ruling each other and doing what they want like in the middle ages.

Biondo is distinguishable from this case because *Biondo* involved a plea to convict the defendant as fulfilling civic duty and defense counsel objected to the improper comments, thus preserving the issue for review on appeal. In the instant case the prosecutor made no plea to convict and defense counsel failed to object. This Court will only reverse if it is plain that the erroneous comments changed the outcome of the trial. *Carines, supra* at 763-764, 597 NW2d 130 (1999).

Here, the evidence against defendant was overwhelming. Defendant knew the purpose of the officers' visit. He was informed about the warrant and was given the opportunity to read it. Doty read the contents of the warrant to defendant. Defendant was warned that if he did not let the inspector in he would be arrested; yet he still did not comply. Moreover, the prosecutor's remarks concerning the jury's civic duty were not so egregious that they could not have been cured by an instruction from the judge. Therefore, we find that any error in the prosecutor's closing arguments did not result in the conviction of an innocent person or seriously affect the fairness of the trial, and we decline to grant relief on this matter. *Carines, supra* at 763, 764.

Defendant further argues that during closing arguments, the cumulative effect of the prosecutor's mention of the jury's civic duty, the marital status of defendant, and defendant's lack of certificate of occupancy for housing tenants, resulted in reversible error. However, after a careful review of the record, we conclude that the remarks did not deprive defendant of a fair trial. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997).

B. Cross Examination of Witness

Defendant next argues that he was denied a fair trial and due process because the prosecutor improperly questioned his only witness, Cheryl Poleshuk. We disagree.

Defendant failed to properly preserve this issue for appeal by an objection to the prosecutor's cross-examination of the witness. The standard of review of a constitutional unpreserved issue requires that the defendant show a plain error that affected substantial rights. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

Defendant relies on *People v Tolewitzke*, 332 Mich 455, 459; 52 NW2d 184, 186 (1952), to support his argument that the prosecutor committed an injustice when he questioned Poleshuk about her marital relationship to defendant. The *Tolewitzke* court stated:

“While it is the well-settled rule that the previous life and character of a witness may be inquired into to elicit facts which may aid the jury in determining what credence they will attach to his testimony, yet it is the duty of the courts to keep such examinations within reasonable bounds. When it is manifest that the design or effect of the questions is not to elicit facts, but to cast suspicion upon the character and credibility of the witness, courts must intervene or trials will result in a miscarriage of justice.” *Id.* at 459, quoting *People v Gotshall*, 123 Mich 474; 82 NW 274 (1900).

Defendant suggests that the instant case violates the rule set forth in *Tolewitzke* because the prosecutor’s examination of Poleshuk was not “within reasonable bounds.” However, just before the prosecutor inquired about the marital status of Poleshuk, both attorneys approached the bench. Until then, the court had been lead to believe that Poleshuk and defendant were married. She had been referred to as “Mrs. Leach” by the court. Defense counsel admitted that cross-examination was the first time he learned that defendant and Poleshuk were not legally married.

We do not find that defendant was denied a fair and impartial trial by the prosecutor’s questioning of Poleshuk. This case is distinguishable from those cases where the prosecutor acted in bad faith in an attempt to prejudice the jurors. Here, it was important that the relationship between Poleshuk and defendant was clear for the jury. *See People v Greenway*, 365 Mich 547, 551; 114 NW2d 188 (1962). Settling the confusion by questioning Poleshuk did not change the outcome of the trial. *Carines, supra* at 763-764, 597 NW2d 130 (1999). Moreover, the prosecutor’s reference to the relationship could have been cured by a judge’s instruction. *Watson, supra* at 586; 629 NW2d 411 (2001).

C. Admission of Prior Offenses

Finally, defendant argues that reversible error occurred when the judge allowed witness testimony that referred to prior bad acts. We disagree.

Defendant did object to the prosecutor’s questions about whether defendant obtained a certificate of occupancy. Whether to admit or exclude evidence is reviewed for an abuse of discretion. *People v Watson* 245 Mich App 572, 575 (2001). Defendant did not object to witness testimony concerning code violations for electrical damage; therefore, we review this issue for plain error affecting substantial rights. *Carines, supra* at 763-764.

In this case, defense counsel objected when the prosecutor questioned Poleshuk about the certificate of occupancy. The prosecutor asked “are you aware of if there was a certificate of occupancy for these [tenants]?” The timely objection preserved this issue for appeal. The objection was overruled and Poleshuk answered “[n]o we were – no one ever asked us to get a certificate.”

Generally, evidence of “prior bad acts” is inadmissible. MCR 404(b). “Res gestae” is the exception to this general rule. “Under that exception, evidence of prior “bad acts” is admissible

where those acts are ‘so blended or connected with the (charged offense) that proof of one incidentally involves the other or explains the circumstances of the crime’”. *People v Robinson*, 126 Mich App 366, 340; 340 NW2d 303 (1983) quoting, *People v Delgado*, 404 Mich 76, 83, 273 NW2d 395 (1978). In this case, whether defendant had a certificate of occupancy formed the basis of the administrative warrant. The trial judge allowed Poleshuk to testify as to her knowledge whether the property was registered in order to explain to the jury why Doty obtained a warrant for inspection. Testimony that the property was unregistered partially explains why Doty obtained a warrant. Therefore, we do not find an abuse of discretion for allowing testimony regarding the certificate of occupancy.

The testimony about the electrical damage was not preserved for appeal. This testimony was not outcome determinative because of the evidence against the defendant and could have been cured by a judicial instruction.

Affirmed.

/s/ Patrick M. Donofrio

/s/ Karen M. Fort Hood

/s/ Bill Schuette